Approved: March 14, 1995
Date

MINUTES OF THE SENATE COMMITTEE ON COMMERCE.

The meeting was called to order by Chairperson Alicia Salisbury at 8:00 a.m. on March 10, 1995 in Room 123-S of the Capitol.

Members present: Senators Salisbury, Burke, Kerr, Petty, Ranson, Reynolds, Steffes and Vidricksen.

Committee staff present: Lynne Holt, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Bob Nugent, Revisor of Statutes
Betty Bomar, Committee Secretary

Conferees appearing before the committee:
Billy Newman, State Self Insurance Fund
Dennis Horner, Kansas Trial Lawyers ASsociation
John Ostrowski, Kansas AFL-CIO
Larry Magill, Executive Vice President, Kansas Association of Insurance Agents
Jeffrey A. Chanay, General Council, Kansas Association of Homes and Services for the Aging, Inc.
Jerry Slaughter, Kansas Medical Society

Others attending: See attached list

SB 327-Change in the provisions of and eligibility for workers compensation benefits

Billy Newman, attorney for the Department of Administration, explained the purpose of proposed amendments to the Workers' Compensation Act contained in SB 327. Mr. Newman that SB 327 is intended to correct inequities and clarify several areas of the Act which have been interpreted or carried out in a manner that appears adverse to legislative intent in 1993. Some policy issues addressed in these amendments are the subject matter of pending litigation. The Administration believe the Kansas Legislature is the proper body to determine public policy rather than the Courts. Mr. Newman explained the proposed amendments. See attachment 1

The Chair advised the Committee that SB 327 would not be acted on this Session. Senator Salisbury appointed the following Senators to work with her to analyze the proposed changes, obtain cost information from the National Council on Compensation Insurance, and report to the full committee in the 1996 Session: Senators Harris, Kerr, Hensley and Petty .

Dennis Horner, Kansas Trial Lawyers Association (KTLA), testified in opposition to SB 327. Mr. Horner stated the rates were decreased 2% in 1994. NCCI has recently recommended a 6.9% reduction in premiums and insurance carriers are being paid higher amounts of premium dollars while paying lower claim losses. The broad-sweeping proposals contained in SB 327 are not warranted. The majority of these amendments restrict the scope of coverage under the Workers' Compensation Act. SB 327 establishes new caps on the amount that can be recovered by a disabled worker or redefines and reclassifies compensable disability in such a manner as to reduce disability awards. The KTLA expressed its concern regarding the amendment on Page 1, lines 36-43, and Page 15, lines 28-35, which totally eliminates entitlement to any kind of permanent disability compensation if the injured worker is not caused to miss at least five consecutive full work days. Page 14, line 42 through Page 15, line 5, fails to recognize the permanent disability compensation is not paid throughout the work life of the injured worker. Page 18 related to the permanent partial general disability; and Page 19, line 43 through Page 20, Line 3 do not recognize that permanent work disability compensation has never been intended to compensate for loss of lifetime earning capacity. See attachment 3

Due to the lack of time, the Chair requested written testimony from John M. Ostrowski representing Kansas AFL-CIO, See attachment 2; Jeffrey A. Chanay, Counsel for the Kansas Association of Homes and Services for the Aging, Inc., See attachment 4; Larry W. Magill, Executive Vice President, Kansas

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

Association of Insurance Agents See attachment 5 to be distributed to all committee members. The Subcommittee will consider the written testimony, as well as testimony to be supplied by Jerry Slaughter, Kansas Medical Society, and other interested parties.

The Committee recessed at 9:00 a.m.

The Senate Commerce Committee reconvened at 9:45 a.m. Friday, March 10, 1995, in Room 123-S of the Capitol.

Members present: Senators Salisbury, Burke, Downey, Hensley, Petty, Ranson, Reynolds, Steffes, and Vidricksen.

Confirmation of Wayne L. Franklin, Secretary, Department of Human Resources.

Senator Reynolds moved, seconded by Senator Burke, Wayne L. Franklin be recommended for confirmation as Secretary, Department of Human Resources. The recorded vote was unanimous in favor of the motion.

Confirmation of Gary Sherrer, Secretary, Department of Commerce and Housing

Senator Vidricksen moved, seconded by Senator Petty, Gary Sherrer be recommended for confirmation as Secretary, Department of Commerce and Housing. The recorded vote was unanimous in favor of the motion.

HB 2305 - Two year moratorium on employment security fund contributions for positive balance employers

Senator Burke discussed the differences between SB 235 and HB 2305, noting his belief that SB 235 is more beneficial over a longer period of time, and recognizing the reality of public support for HB 2305.

The Chair requested that a consensus be reached by the Committee on the basic components of the bills and decide between them, acknowledging that HB 2305 is to used as the vehicle for the amendments.

Moratorium. The Committee unanimously agreed on a two year moratorium to be reviewed after the first year to insure Trust Fund solvency.

Tax Reduction. The Committee unanimously agreed on a .50% reduction in Schedule III rates following the moratorium.

New Business Tax. The Committee unanimously agreed to section 1 (1)(B)(i) in HB 2305 regarding new employers.

Treatment of businesses delinquent in filing reports or paying unemployment tax. The Committee unanimously agreed that an amendment be drafted to provide for a procedure of thirty (30) days following the date of mailing of amended experience rating notices to file reports or to bring payments current in order to qualify for a moratorium.

The Chair requested language be submitted to her, Senators Burke, Ranson and Downey for review.

Employer survey The Committee unanimously agreed to delete New Section 2, providing for a survey, in its entirety.

Senator Burke moved, seconded by Senator Steffes, HB 2305 be recommended for passage as amended. The recorded vote was unanimous in favor of the motion.

The Committee adjourned at 11:00 a.m.

The next meeting is scheduled for Monday, March 13, 1995.

SENATE COMMERCE COMMITTEE GUEST LIST

DATE: March 10, 95

NAME	REPRESENTING
Chip Wheelen	Ks Medical Society
Jerry Slaughter	" " "
Bill Newman	Dept of Admin.
Kathryn D Myers	Dept Admin
Terry Leatherman	KCCI
Wayne Maichel	KS. AFL-CIO
Tom Newman	KS Governmental Consultancy
Richard Thomas	DHR / Workers Compensation
David Shufelt	DHR / Workers Compensation
Mark Burghart	KDOC&H
John Ostrowski	AFL-CIO
John McHaff	AFL-CIO
Jenny Haecke	Div of Personnel Services
Susan Stanley	DHR/WRRSCompn
Jon Smith	Ks Bar Assoc
Art Brown	Mid-Am Lumbermens Assn
Roger Francis	Ks Gov Consulting
[illegible]	Ks Farm Bur
Marlin Rust	KS Div of WC

TESTIMONY TO THE
SENATE COMMERCE COMMITTEE
by Billy E. Newman
Department of Administration
State Self Insurance Fund
RE: Senate Bill No. 327

Madame Chairperson and members of the Committee, my name is Billy Newman and I am an attorney for the Department of Administration. I am appearing today to testify on behalf of the Department of Administration in support of Senate Bill 327.

In 1993, the Legislature made many meaningful reforms to the Kansas Workers' Compensation Act. With almost two years of experience under the 1993 amendment, the administration feels that it is time to look at this Act and have a healthy discussion about amendments to make it more beneficial for both employees and employers. The Department of Administration offers this legislation as a starting point of discussion concerning the Workers' Compensation Act. Certainly, this bill would bring changes to the Act. Some, of course, will oppose change. However, the administration feels it is important to put forth a proposal and begin the discussion.

Senate Bill 327 was put together to address policy issues we in the State Self Insurance Fund office have come upon over the last two years. The bill attempts to correct inequities and clarify several areas of the Act which have been interpreted or carried out in a manner that appears adverse to the original legislative intent. Input for the bill also was solicited from others outside our Department who represent employers and insurers. We have endeavored to provide amendments that are fair to both employers and employees and assure that workers are fairly compensated for injuries arising out of their employment.

Some of the policy issues addressed involve issues that are the subject matter of pending litigation. The administration encourages the Committee to not defer to the Courts on such policy issues. We believe the Kansas Legislature is the proper body to determine what will be public policy for the State of Kansas.

Attached is an outline briefly describing the contents of each section. Following the outline is a more detailed decision of the amendments which I will now review then stand for questions.

March 10, 1995
Commerce

Attachment 1

Section 1:

•Reinstates requirements that claimant be off work one week to •qualify for work disability. (pg. 1, LL 32-43)

•Defines compensable injuries. (pg. 2, LL 1-5)

•Employee use of safety devices. (pg. 2, LL 7-13)

•Ends requirement that employer pay two to three forms of benefit insurance for same disability coverage. (pg. 3, LL 34-43)

Section 2:

•Compensation for losses due to employment.(pg. 6, L 8)

•On compensability of natural aging process and activities of day-to-day living. (pg. 6, LL 14-15)

Section 3:

•Per review and utilization review. (pg. 12, LL 1-16)

•Unauthorized medical benefits. (pg. 13, LL 36-43)

Section 4:

•Pyramiding of benefits. (pg. 14-15, LL 42-7)

Section 5:

•Requires claimant to be off work to receive scheduled benefits. (pg. 15, LL 28-35)

Section 6:

•Work disability. (pg. 18, LL 23-30)

•Ratings based upon AMA Guide, 4th Edition. (pg. 18, LL 23-38)

•Loss of wage. (pg. 18, L 41)

•Neutral physicians. (pg. 19, LL 1-12)

•Statutory benefit maximum. (pg. 19-20, LL 42-3)

•Language adopted in Senate Bill 242. (pg. 20, LL 12-22)

Section 7:

•Work disability.(pg. 21, LL 10-14)

Section 8:

•Independent medical examinations. (pg. 26, LL 1-8)

Section 9:

•Post award attorney fees. (pg. 29, LL 11-17)

Section 1, pg. 1, LL 32-43: K.S.A. 44-501(c)

(c) ~~Except for liability for medical compensation, as provided for in K.S.A. 44-510 and amendments thereto, the employer shall not be liable under the workers compensation act in respect of any injury which does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed.~~ *Unless the employee is temporarily totally disabled as a result of a work-related injury for a period of more than five consecutive full work days, the employer shall not be liable for any compensation except medical compensation as provided for in K.S.A. 44-510 and amendments thereto. Only after a specific finding of fact by the administrative law judge that the employee was temporarily totally disabled as specified in this subsection shall the employer be liable for any other compensation under this act.*

Note the **existing** law language that is shown as stricken on lines 32-36. Even though it says that employers are not liable for injury (other than medical compensation) unless the employee is disabled for at least a week, Kansas Supreme Court decisions have **not** applied this language. (See Alexander v. Chrysler Motor Parts Corporation, 167 Kan. 711(1949); Shepherd v. Gas Service Company, 186 Kan. 699(1960); Gillig v. Cities Services, 22 Kan. 369(1977).

The purpose of the new language in lines 36-42 is to overturn these cases. This issue is presently before the Appeals Board, however, courts may view the Legislature's failure to respond to the Kansas Supreme Court's previous interpretations of this section as acquiescence by the Legislature that the Court has correctly stated the Legislature's intent. We encourage the Committee to revisit this policy issue and make legislative intent clear.

Section 1, pg. 2, LL 1-5: K.S.A. 44-501(c)

The employee shall not be entitled to recover *permanent partial or general body disability* for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. *At a minimum*, any award of compensation shall be reduced by the amount of functional impairment *for which the employee has been previously compensated* determined to be ~~preexisting~~ *existing*.

The intent behind the 1993 change in this section was to end the former policy of injured employees being unjustly enriched as a result of receiving benefits for disabilities which pre-existed the work related accident. This legislative intent is evident from the 1993 amendments that did away with the second injury fund which would have been liable for compensation arising out of a pre-existing condition. It is also evident by the legislature's redefinition of the term "personal injury" and "injury"

which now excludes disability as a result of the natural aging process or by normal activities of day-to-day living.

This proposed amendment is introduced as a result of arguments contending that an employer remains liable for pre-existing work disabilities because the current language only reduces the benefits by the pre-existing functional impairment which existed immediately prior to the work related accident. This argument would not allow reduction for pre-existing work disability, even in cases where the claimant has previously been fully compensated for that loss. Absent the proposed change, the benefit which the 1993 Legislature intended to eliminate would simply be shifted to the employer/insurance carrier after the scheduled elimination of the second injury fund.

Section 1, pg. 2, LL 7-13: K.S.A. 44-501(d)(1)

(d) (1) If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's ~~willful~~ *intentional* failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

The Workers' Compensation Act provides that if an employee willfully fails to use his guard or protective device provided by the employer, and is injured as a result of that failure, he should not receive benefits under the Workers' Compensation Act. The Court's have interpreted the word "willful" to mean something greater than gross negligence; the claimant must have acted intractably; without yielding to reason; obstinately or perversely; with headstrong disposition to act by the rule of contradiction. Therefore, it is nearly impossible for an employer to successfully bring the statutory defense. (See Carter v. Koch Engineering, 12 Kan.App. 2d 74(1987).

The purpose of the proposed amendment is to specifically overturn the holding in Carter, and recognize that an employee should not be rewarded for intentional unsafe practices in contravention of employer policy and procedures.

Employees will retain protection under K.A.R. 51-20-1 which requires an employer to rigidly enforce relevant safety rules.

Section 1, pg. 3, LL 34-43: K.S.A. 44-501(h)

(h) If the employee is *eligible for or* receiving *disability or* retirement benefits under the federal social security act or *any disability or* retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such *disability or* retirement benefits, less any portion of any such *disability or* retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the

The Act presently allows for a set-off against retirement benefits received under the Federal Social Security Act or any other retirement system, program or plan which is provided by the employer against which the claim is being made.

The purpose of the amendment is to also include a set-off against those funds which the employee is eligible to receive under a disability benefit program arising under the Social Security Act or other program or plan which is employer provided. The intent behind this change is to (1) provide a fair method for determining general body (work) disability provided to persons who are no longer in the labor force, and (2) prevent the employer from paying as many as three forms of benefit insurance for the same disability (i.e., social security, disability pension benefits and workers' compensation benefits).

Section 2, pg. 6, L 8: K.S.A. 44-508(d)

(d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer *only* bear the expense of accidental injury to a worker caused by the employment.

The purpose of this proposed amendment is to clarify the legislature's intent that industry should have the burden of compensating employee's for "only" that economic or physiological loss which arises out of and in the course of employment.

Section 2, pg. 6, LL 14-15: K.S.A. 44-508(e)

(e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have ~~been directly caused by~~ *arisen out of and in the course of* the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

The Act presently states that an injury shall not be deemed to have "been directly caused" by the employment where it is shown that the employee suffers disability as a result of a natural aging process or normal activities of day-to-day living. However, to be entitled to benefits a claimant must only show that the injury "arose out of and in the course of employment". Because these standards are not the same, the court may conclude that a claimant should receive benefits even though the disability is a result of the natural aging process and normal activities of day-to-day living.

Section 3, pg. 12, LL 1-6: K.S.A. 44-510(12)

(12) All reports, information, statements, memoranda, proceedings, findings and records which relate to utilization review or peer review conducted pursuant to this section, including any records of peer review committees, shall be available for in camera review and consideration by the administrative law judge assigned to any proceeding held pursuant to this section.

If there is a dispute over whether a health care provider's services are reasonable and necessary or if those services are being charged properly, an employer may request a peer review committee and utilization review committee review the medical treatment history. At present, the findings and records of those committee's are not available to the employer or even to an administrative law judge deciding motions for a change of physician or for additional medical treatment. As a result, an administrative law judge may order an employer to provide treatment which the benefit review and peer review committee's have determined to be inappropriate.

Recognizing that peer and utilization review studies are usually not open to public scrutiny, this new subsection (12) permits an in camera (non-public) review of peer review and utilization reports by the administrative law judge.

Section 3, pg. 13, LL 36-43: K.S.A. 44-510(c)(2)

(2) Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of ~~examination,~~ diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of $500. The amount allowed for such ~~examination,~~ diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

In 1993 the Legislature attempted to eliminate the situation where employers, through the payment of unauthorized medical benefit, paid for a rating obtained by the claimant which would be used as evidence to increase his or her award.

The word "examination" has been interpreted by some attorneys to allow a doctor to provide all examination and testing required for a rating under the AMA Guides. The doctor, however, does not provide the rating. This examination is then seen to be payable under unauthorized medical. Later, the doctor will provide a rating at minimal or no cost to the employee.

The purpose of this change is to clarify that unauthorized medical benefits may only be used for the intended purpose of diagnosis and treatment.

Section 4, pg. 14-15, LL 42-7: K.S.A. 44-510a(a)

Sec. 4. K.S.A. ~~44-~~510a is hereby amended to read as follows: ~~44-~~510a. (a) If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workers compensation act, and suffers a later injury, compensation payable for any permanent total or partial disability for such later injury shall be reduced, as provided in subsection (b) of this section, by the percentage of contribution that the prior disability contributes to the overall disability following the later injury. The reduction shall be made only if the resulting permanent total or partial disability was contributed to by a prior disability and if compensation was actually paid or is collectible for such prior disability. ~~Any reduction shall be limited to those weeks for which compensation was paid or is collectible for such prior disability and which are subsequent to the date of the later injury. The reduction shall terminate on the date the compensation for the prior disability terminates or, if such compensation was settled by lump-sum award, would have terminated if paid weekly under such award and compensation for any week due after this date shall be paid at the unreduced rate.~~ Such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment.

This proposed amendment recognizes the discontinuation of the second injury fund which, prior to 1993 amendments would have been liable for pre-existing disability. Failure to make this change unjustly provides pyramiding disability benefits to the claimants, at employers' expense. This is especially true as a result of the accelerated compensation payments under the 1993 amendments. The amendment also brings K.S.A. 44-510a into conformity with K.S.A. 44-501(c).

Section 5, pg. 15, LL 28-35: K.S.A. 44-44-510d(a)

Sec. 5. K.S.A. 44-510d is hereby amended to read as follows: 44-510d. (a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510 and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66⅔% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. *Unless the employee is temporarily totally disabled as a result of a work-related injury for a period of more than five consecutive full work days, the employer shall not be liable for any compensation except medical compensation as provided for in K.S.A. 44-510 and amendments thereto. Only after a specific finding of fact by the administrative law judge that the employee was temporarily totally disabled as specified in this subsection shall the employer be liable for any other compensation under this act.* If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

See: Comments on Section 1, pg. 1, LL 32-43

Section 6, pg. 18, LL 23-30: K.S.A. 44-510e(a)

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks ~~that the employee performed in any substantial gainful employment during the fifteen year period preceding the accident~~ *of the same type and character that the employee was performing at the time of the injury*, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker ~~is earning~~ *has the ability to earn* after the injury. *The employee shall not be deemed to have lost the ability to perform a work task if that task may be performed with reasonable accommodation.*

This amendment returns the State of Kansas to the pre-1987 (Ploutz) test for determining work disability. It also recognizes an employer's duty to provide reasonable accommodation under federal law.

The State departed from this test in 1987 due to cases which allowed an employee to maximize benefits from a work related injury while working for another employer at the same or greater salary. This problem was eliminated in 1993 when the Legislature provided that no work disability shall be awarded in cases where an employee returns to work, earning a salary equal to 90% or more of the pre-accident average weekly wage.

Two years experience with the present test has shown it to be ineffective in reducing litigation for the following reasons:

1. Many persons can no longer perform work tasks of 10-15 years ago due to the natural aging process, deconditioning and vocational or technical changes in the work force. This is a question of fact which is not easily set aside.

2. Respondents often have little or no opportunity to test the accuracy of claimant testimony relative to work tasks performed for other employers over the past 15 years.

3. In cases where previous employers will cooperate, the increased number of depositions necessary to provide evidence covering 15 years unnecessarily increases litigation and costs to both parties.

4. Focusing on actual wage loss rather than a loss in the claimant's ability to earn a compensable wage allows the claimant to inflate his disability rating by temporarily performing less competitively in the labor market.

This change will allow an employer and employee access to identical information and thus reduce

litigation and costs. It will also provide a meaningful, objective, measurable criteria for work disability and thus afford a greater opportunity for settlement negotiation rather than adversarial litigation. It also takes into consideration that employers must make reasonable accommodations for employees with disabilities if those accommodations will enable the employee to perform the essential job tasks.

One positive alternative to Ploutz would be to reduce the 15 year history to a five year history and provide for an imputed wage in some circumstances as outlined in Senate Bill 242.

Section 6, pg. 18, LL 36-38: K.S.A. 44-510e(a)

In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the ~~third edition, revised, of the American Medical Association Guidelines for the Evaluation of Physical Impairment~~ *Guides to the Evaluation of Permanent Impairment, 4th edition, published by the American medical association*, if the impairment is contained therein.

The present act requires that ratings be based upon a book which does not exist. The book originally intended to be used is now out of date. This amendment corrects that error and directs physicians to use the most recent medical guide presently available.

Section 6, pg. 18, L 41: K.S.A. 44-510e(a)

An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in *or has refused a bonafide offer to engage in* any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Under the present system, if a worker is unemployed at the time of his regular hearing, he automatically qualifies for a 50% work disability. The Court of Appeals recognized in Foulk v.

Colonially Terrace, 20 Kan.App. 2d____, Case No. 71, 139, decided December 16, 1994, that this places far too much control in the hands of the claimant who may purposely avoid employment in order to enhance his benefits.

This amendment codifies the Foulk decision and recognizes the injured parties duty to mitigate their damages.

Section 6, pg. 18-19, LL 43-12: K.S.A. 44-510e(a)

If the employer and the employee are unable to agree upon the employee's functional impairment, *and such inability to agree is based upon two or more conflicting functional impairment ratings,* such matter shall be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which ~~shall~~ *may, if supported by the admissible testimony of such health care provider,* be considered by the administrative law judge in making the final determination.

Some administrative law judges have interpreted the requirement that they seek an independent medical evaluation if the parties can not agree upon a functional impairment in such a way that claimants may bypass the unauthorized medical limitations of K.S.A. 44-510(c)(2)by merely stating that they disagree with the single functional impairment rating provided by the treating physician. The administrative law judge then assigns a neutral physician and that rating is considered by the judge without benefit of a deposition. The cost of this rating is then assessed against the employer. This, was clearly not the intent of the 1993 reform.

The recommended changes will require that a claimant have a reasonable medical basis for disagreeing with a treating physician's functional impairment rating. It also would require the independent medical examiner to be deposed in order to provide a foundation for his testimony. This places that neutral provider on the same level footing as all other physicians.

Section 6, pg. 19-20, LL 42-3: K.S.A. 44-510e(c)

(c) The total amount of compensation that may be allowed or awarded an injured employee for all *work-related* injuries received in ~~any one accident~~ *the employee's lifetime* shall in no event exceed the *maximum* compensation which would be payable under the workers compensation act for 100% permanent total disability ~~resulting from such accident~~.

This amendment may be considered controversial by some, however, it recognizes that an employer should not be required to compensate an employee for the same disability twice. Absent this change, the statutory maximum is ineffective and fosters fraud.

Section 6, pg. 20, LL 12-22: K.S.A. 44-510e(e)

(e) In any case of injury to or death of ~~a female~~ *an* employee, where the ~~female~~ employee or ~~her~~ *the employee's* dependents are entitled to compensation under the workers compensation act, such compensation shall be exclusive of all other remedies or causes of action for such injury or death, and no claim or action shall inure, accrue to or exist in favor of the surviving ~~husband~~ *spouse* or any relative or next of kin of such ~~female~~ employee against such employer on account of any damage resulting to such surviving ~~husband~~ *spouse* or any relative or next of kin on account of the loss of earnings, services, or society of such ~~female~~ employee or on any other account resulting from or growing out of the injury or death of such ~~female~~ employee.

These changes reflect non-discriminatory language and has been suggested under Senate Bill No. 242.

Section 7, pg. 21, LL 10-14: K.S.A. 44-511(a)(2)

Additional compensation shall not include the value of such remuneration until and unless such remuneration is discontinued. *Such remuneration shall not be deemed discontinued if the employee voluntarily separates from employment for reasons unrelated to the work-related injury or if the employee is terminated from employment for reasons unrelated to the work-related injury.* If such remuneration is discontinued subsequent to a computation of average gross weekly wages under this section, there shall be a recomputation to include such discontinued remuneration.

This change recognizes that an employee should not be unjustly benefited for quitting, being fired, or retiring for non-injury related reasons. It follows the reasoning by the court in Foulk v. Colonial Terrace, 20 Kan.App. 2d___, Case No. 71, 139, decided December 16, 1994. Under the present system, an employee who voluntarily removes himself from the labor market is rewarded with an enhanced average weekly wage which includes the past benefits.

Section 8, pg. 26, LL 1-8: K.S.A. 44-515(c)

(c) Unless a report is furnished as provided in subsection (a) and unless there is a reasonable opportunity thereafter for the health care providers selected by *either* the employee *or the employer* to participate in the examination in the presence of the health care providers selected by *either* the employer *or the employee*, the health care providers selected by the employer or employee shall not be permitted afterwards to give evidence of the condition of the employee at the time such examination was made.

This proposed amendment allows the employer the same right to participate in an independent medical examination that is presently enjoyed by the employee.

Section 8, pg. 26, LL 13-20: K.S.A. 44-515(e)

(e) The employer shall not be required to pay for any service of a health care provider unless the health care provider includes with a statement of the services for which payment is requested, written and legible medical records which accurately describe the services rendered to the worker including histories provided by the worker, pertinent findings, examination results and test results. The statement of services and corresponding medical records shall clearly indicate the date when the service was provided to the worker.

This proposed amendment corrects an administrative problem which requires employers to pay a medical bill within 20 days after receipt of a demand letter by the employee even though the physician does not provide the necessary legible medical records to ascertain whether the services are reasonable and necessary for the cure and relief of the claimant's work related condition or were provided for a service unrelated to the work injury.

Section 9, pg. 29, LL 11-17: K.S.A. 44-536(h)

(h) In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, in connection with an attempt to seek an additional award of temporary partial, temporary total, permanent partial or permanent total disability and those services fail to result in an additional award of such compensation, the attorney fees shall be paid by the employee.

Under the present system, an attorney may seek to enhance an employee's award by filing for review and modification every six months. If he loses his case, the employer has to pay the claimant's attorney fees which are often requested at $100.00 - $125.00 per hour. Last year, almost 5% of the State Self-Insurance Fund's total attorney service expenses went to claimant attorneys as a result of post-award actions. The effect of this amendment will be to reduce marginal litigation.

TESTIMONY BEFORE THE SENATE COMMERCE COMMITTEE
SB 327
KANSAS AFL-CIO
JOHN M. OSTROWSKI
March 10, 1995

INTRODUCTION

For the most part, SB 327 represents yet another benefit reduction bill. It is distressing that following the 1993 so-called "reform" legislation, such a bill would be introduced in this legislature. It is also distasteful that the comments accompanying SB 327 contain highly inflammatory language such as "unjust enrichment", "circumventing the legislature", employees being "rewarded for intentional unsafe practices", and "fostering fraud".

The alleged impetus for the slashing of benefits in 1993 was rising premiums. Assuming for the moment the logic of that premise, one must question what motivation exists for SB 327. Although there should be a natural annual increase in work comp premiums (due to inflation, increased wages, increased medical, etc.), the NCCI has recently filed for a rate **decrease**. The Kansas legislature should be considering a restoration of benefits for its most precious resource, the workers and their families of this State.

We again remind the legislature that on a national scale Kansas has extremely low rates. On a national scale, Kansas also pays meager benefits for injuries. The low payout reduces incentives for safety and cost efficiency in handling claims. Indeed, Kansas' safety record in the workplace is quite depressing.

Before reviewing SB 327, we would remind the legislature of some of the items from the 1993 legislation which reduced or eliminated benefits for injured workers and their families:

* 10-day notice (legitimate injuries that take place in the workplace are uncompensated in any fashion due to the shortest statute of limitations existing in any law)

* a cap on benefits which treats the high wage earner unequally and destroys any meaningful wage replacement for workplace injuries

* scheduling of shoulder injuries such that any worker who relies on his/her upper extremities to work is penalized

* slashing of claimant's attorney's fees such that many workers can no longer find representation for valid claims and no worker can hire an attorney to secure rights such as medical treatment because the taking of a fee is illegal

* total elimination of vocational rehabilitation such that injured workers cannot restore their earning capacity except in highly unusual cases

* offsets for preexisting conditions such that a standard of health is now imposed on every Kansas employee for every known medical condition

* elimination of unauthorized medical for evaluation purposes, while simultaneously retaining the insurance carrier's right to hand pick select physicians, and severely limiting the ALJ's ability to assign different physicians for injured workers

* redefining compensability, and creation of additional defenses, such that more injured workers are excluded for work-related injuries from the system completely.

It is also true that many of the provisions of SB 327 were contained in previous pieces of legislation. Much of this bill is merely a resurfacing of those ideas which were previously negotiated, compromised, or rejected.

Finally, the legislature often hears about and attempts to avoid the "evils" of litigation. Not a single appellate case exists relative to the 1993 changes. Every change of the law will have a tendency to require court interpretation. It is simply irresponsible to make major changes again to the Kansas Workers Compensation Act.

BILL REVIEW

The Kansas AFL-CIO does not oppose proposed changes found at Section 3, page 12, lines 1-16 and Section 6, page 20, lines 12-22. Other than that, the Kansas AFL-CIO **OPPOSES** all other changes as ill advised and inappropriate.

This written opposition will follow the format of a previously submitted summary of changes in SB 327.

Section 1, p. 1, LL 32-43: This provision was originally written out of the law for valid reasons. Reinsertion is probably unconstitutional (disparate treatment for similar injuries), and would lead to "gamesmanship". Employers could give employees one hour of at home work, pay wages, and thus defeat any claim for disability. Employees would be "encouraged" to miss work to avoid this penalty. Furthermore, if a person has a permanent impairment, why we would not want to pay them for it based on a totally arbitrary standard of missed work time?

Section 1, p. 2, LL 1-5: Attempt to reopen a compromise that was reached in 1993. Totally inappropriate to further reduce benefits. This provision is completely unworkable as drafted. Employers do

not now pay for the preexisting functional impairment. While defining preexisting conditions is often difficult, it at least is not impossible.

Section 1, p. 2, LL 7-13: Probably changes nothing, but will lead to litigation to determine why the law was changed.

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Section 2, p. 6, L 8: Probably changes nothing, but will lead to litigation to determine why the law was changed.

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Section 5, p. 15, LL 28-35: See above as this is a repeat.

Section 6, p. 18, LL 23-30: Extensive debate was had on the concept of work disability. To again change the definition of work disability will cause further litigation and confusion within the workers compensation act. There has been no court interpretation of the present section, and with increased insurance profits, falling rates, and increased competition in the insurance marketplace, one would have to presume that the present definition is accomplishing which was intended in 1993.

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Section 6, pp. 19-20, LL 42-3: Highly objectionable, and probably unconstitutional. The law has had multiple definitions of work disability over the years. Many employees have received compensation for injuries to their hands and legs which are already over the proposed "cap". If these workers were to lose an eye, lose a leg, or injure their back, they would receive zero benefits. The provision has been previously rejected by the legislature. Section unworkable because as permanent total increases in the years, workers with similar claims end up being treated differently depending on year of injury.

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CONCLUSION

This bill is not a clean-up bill. It does not merely clarify legislative intent. It is a major piece of legislation which, again, is anti-worker. The Kansas AFL-CIO opposes SB 327.

TESTIMONY BEFORE THE SENATE COMMERCE COMMITTEE
SB 327
KANSAS AFL-CIO
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March 10, 1995
Commerce

Attachment 2

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KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

TO: Senator Alicia Salisbury and Members of the Commerce Committee

FROM: Dennis Horner on behalf of Kansas Trial Lawyers Association

RE: S.B. 327

DATE: March 10, 1995

* * * * * * * *

Senate Bill 327 is a solution searching for a problem to solve. In 1993, wholesale changes in the Kansas Worker's Compensation Act were adopted by the Legislature following substantial debate. The vast majority of these amendments either restricted the scope of coverage under the Worker's Compensation Act, established new caps or lids on the amounts that could be recovered by a disabled worker, or redefined and reclassified compensable disability in a manner which had the effect of reducing disability awards. In other words, the economic burden of these amendments was placed upon injured workers.

Although these amendments followed on the heels of a 3.9% hike in the premium allowed to be charged for worker's compensation insurance coverage, it is questionable whether the 1993 amendments were really necessary, since the loss ratio (loss ration is defined as claim amounts at current benefit levels divided by premiums at current rate levels) for Kansas worker's compensation insurors actually decreased in 1992. (See "Kansas Historical Loss Ratios" attached hereto as Exhibit A). Moreover, according to statistics found in the Division of Worker's Compensation 20th Annual Statistical Report published on 1 July 1994, in 1992 and 1993 Kansas worker's compensation insurance carriers were being paid higher and higher amounts of premium dollars while paying lower and lower claims losses. (See "Worker's Compensation Insurance Experience" attached hereto as Exhibit B). Since claims dollars had substantially decreased two years in a row, and premium dollars had substantially increased at the same time, a persuasive case is thus established that the 1993 amendments were unnecessary. Be that as it may, the 1993 amendments have certainly accelerated and expanded the profitability of worker's compensation insurance in Kansas. According to statistics presented to the House Business, Commerce and Labor Committee on 22 February 1995, employers saved almost $59,000,000 in 1994 due to the "reforms" implemented by the 1993 Legislature. (See "Cumulative Employer $avings Due to Kansas Reform" chart attached hereto as Exhibit C). As expected, the Kansas Insurance Department in 1994 ordered a 2% reduction in the premium costs to Kansas employers for worker's compensation insurance coverage. Finally, the NCCI on 22 February 1995 announced

Terry Humphrey, Executive Director

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March 10, 1995
Attachment 3.

that they were recommending a 6.9% reduction in premiums to Kansas employers for worker's compensation insurance.

Given these facts, the Kansas Trial Lawyer's Association fails to see the need for implementing another series of comprehensive amendments to the Worker's Compensation Act. Today, there is no "crisis" in availability and affordability of worker's compensation insurance coverage for Kansas industries. Therefore, a case cannot be made today for further reductions in coverage and limitations upon disability benefit recoveries. The amendments sought in Senate Bill 327 will exact hardship upon injured workers when there is no recognized good reason for exacting such harm. We hope that the rule of reason will prevail in your deliberations on Senate Bill 327.

Without going into item-by-item detail, we do wish to express the following concerns regarding specific changes proposed by Senate Bill 327. First, the changes proposed at pg. 1, lines 36-43, and pg. 15, lines 28-35, would totally eliminate entitlement to any kind of permanent disability compensation, if the injured worker is not caused to miss at least five consecutive full work days as a result of his injury. Please understand that it is not unusual under current law that injured workers will be taken back to work promptly after a surgery upon a finger, hand or arm because employers in certain industries will bring these workers back to work immediately, and certain physicians are commonly permitting these workers to return to work immediately on the sole condition that they engage in "one-handed" work only. This is quite typical in the meatpacking industry following surgery on one arm or hand. Obviously, in these situations the injured workers are not receiving any temporary total disability benefit compensation, nor should they receive such compensation, if they are back to work earning a comparable wage so quickly following injury or surgery. If these changes are adopted, however, the injured worker would not receive any permanent disability benefits either. If the injured worker suffered the amputation of a finger while working, but was allowed to return to work less than one week later under a "one-handed" type of restriction, the injured worker would never be compensated for the loss of the finger. The same thing could happen with the loss of an eye or a toe, or following surgery on one leg (if the employer took the employee back to work in less than one week at a position that did not require the employee to stand).

In addition, if the injured worker was unable to be permanently retained at work by this employer because of the extent of the injury and/or permanent work restrictions, and the employer terminated the services of the injured worker after the healing process had been completed, the injured worker would not be permitted to recover permanent disability compensation when it is undisputed that the permanent consequences of the injury have destroyed his ability to continue working for the employer.

The change proposed at pg. 14, line 42 through pg. 15, line 5 fails to recognize that permanent disability compensation is not paid throughout the work life of the injured worker. Current law allows for a recution in permanent disability benefits arising from a work-related injury in order to prevent a double recovery. Moreover, 415 weeks is the maximum length of time over which a work disability award can be paid, which is about eight years. If a 25 year old worker sustains a back injury, and receives a work disability recovery therefore, the compensation provided under current law is designed to expire in eight years. If this same worker suffers an aggravation of this injury at age 50, and is again saddled with a work disability, not only will he be prevented from recovering for the pre-existing functional impairment to the lower back, but the monetary benefits he received thirty years previous would be subtracted from his recovery for the second injury. When the monetary benefits paid for the first injury were never intended to compensate for work disability beyond 415 weeks it is unfair to reduce his work disability recovery on the second case because of the previous permanent disability recovery.

The changes proposed on pg. 18 have to do with permanent partial general disability. The Kansas Trial Lawyers Association fails to understand why it necessary to amend this statutory language for a third time in nine years. In light of the steady decrease in claims costs that have been enjoyed by Kansas worker's compensation insurors since 1992, where is the justification for redefining this complicated statute so soon after the 1993 changes? Wouldn't it be rational and prudent to hold off on more changes of this gravity until the worker's compensation system has a chance to get used to the definition that was implemented in 1993? If one of the goals sought to be accomplished is premium stability for worker's compensation insurance in Kansas, Senate Bill 327 will not help to accomplish that goal. Every time the Worker's Compensation Act is substantially rewritten, a great deal of confusion results. This confusion cannot help but make it more difficult for the NCCI and insurors in general to predict claims costs and premium needs. Moreover, what is meant at line 41 by a "bonafide offer"? Does the offer have to be for a job that accommodates any existing permanent work restrictions? If the injured worker is a single parent with minor children, and the only offer of reemployment is for a third shift position which she cannot accept because of her minor children, is she going to be denied a work disability recovery for refusing such an offer? What about an offer to return to work that would require the injured worker to relocate, or drive a hundred miles from home?

The change proposed on pg. 19, line 43 through pg. 20, line 3 again, does not recognize that permanent work disability compensation has never been intended to compensate for loss of lifetime earning capacity. If a 25 year old worker suffers a severe back injury that entitles him to a 50% work disability, and then he suffers a career-ending brain injury at age 50, these proposed changes would

only allow an additional 50% work disability recovery. This would be so even though the second injury had nothing to do with the first injury. This would be so even though the second injury totally destroyed his earning capacity.

Exhibit A 3-5

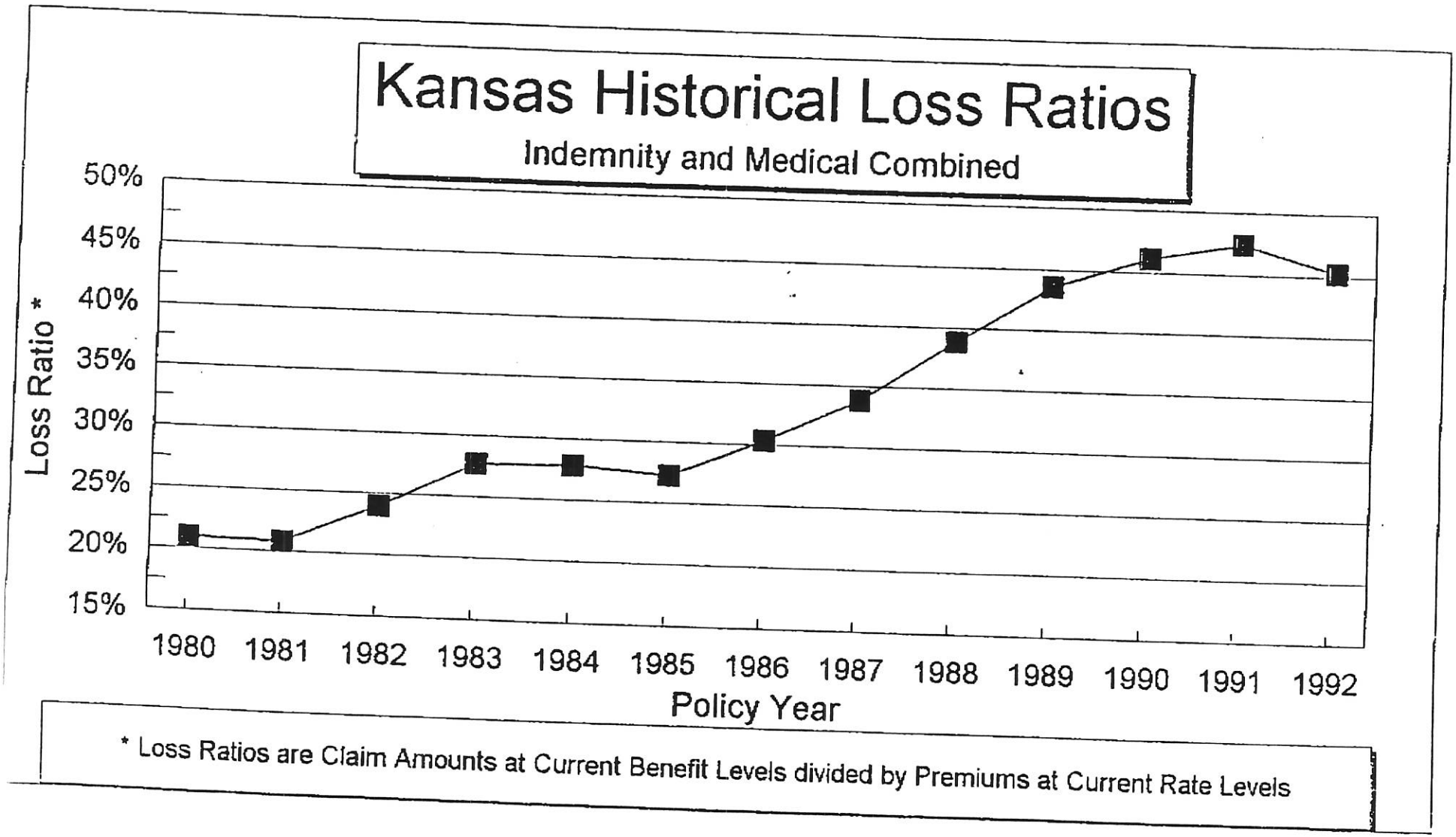

Kansas Historical Loss Ratios
Indemnity and Medical Combined
Loss Ratio *
50%
45%
40%
35%
30%
25%
20%
15%
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
1990
1991
1992
Policy Year
* Loss Ratios are Claim Amounts at Current Benefit Levels divided by Premiums at Current Rate Levels

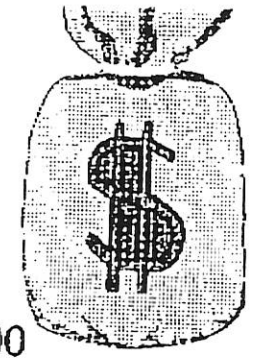
Exhibit B 3-6

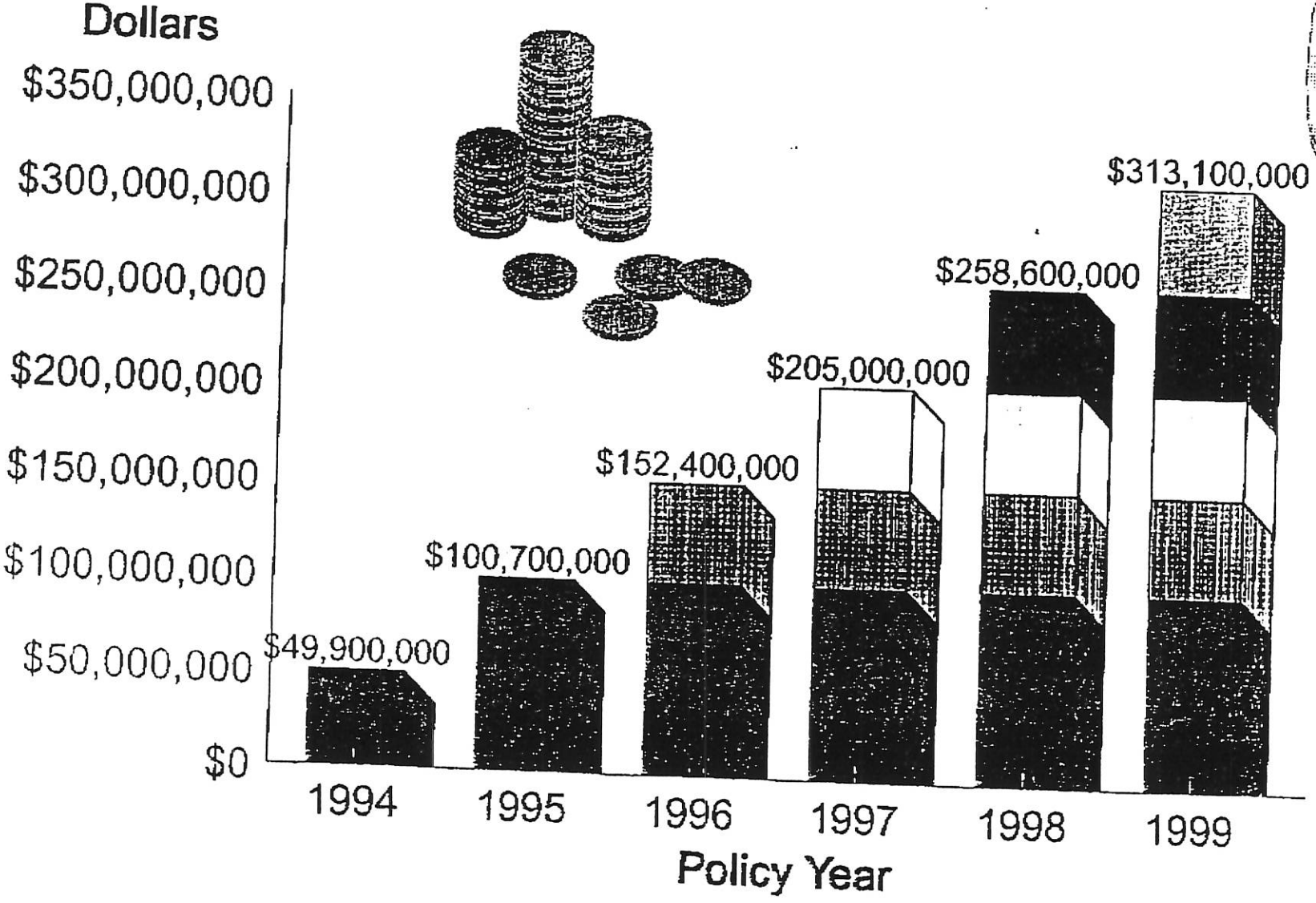
WORKERS COMPENSATION INSURANCE EXPERIENCE

Prepared by Kansas Insurance Department

Year	Direct Premiums Written	Direct Premiums Earned	Direct Losses Paid	Direct Losses Incurred	Premiums Written to Losses Paid	Premiums Earned to Losses Incurred
1979	118,240,623	113,676,699	60,281,756	82,086,752	51.0	72.2
1980	141,189,216	138,145,343	72,697,056	102,896,246	51.5	74.5
1981	156,207,756	149,261,425	80,425,265	101,691,667	51.5	68.1
1982	154,944,245	152,315,135	88,345,714	107,979,341	57.0	70.9
1983	147,137,981	148,669,330	96,289,968	115,282,150	65.4	77.5
1984	141,097,000	140,223,000	106,701,000	125,520,000	75.6	89.5
1985	172,985,620	170,955,138	120,755,675	147,438,366	69.8	86.2
1986	208,167,277	202,033,619	134,554,116	170,153,475	64.6	84.2
1987	233,674,161	222,846,661	147,885,631	195,885,084	66.1	87.9
1988	257,039,527	259,548,305	164,553,813	208,332,654	64.0	80.3
1989	264,102,264	263,386,009	184,857,801	239,142,874	70.0	90.8
1990	291,804,714	293,048,038	222,309,953	265,726,660	76.2	90.7
1991	342,803,582	338,869,988	245,685,923	322,711,452	71.7	95.2
1992	364,184,283	360,759,612	234,729,527	289,992,534	64.5	80.4
1993	367,030,245	365,646,558	220,091,021	231,228,324	60.0	63.2

due to Kansas Reform





KAHSA
KANSAS ASSOCIATION OF
HOMES AND SERVICES FOR THE AGING

MEMORANDUM

To: Senate Commerce Committee

From: Jeffrey A. Chanay, Entz & Chanay

Date: March 10, 1995

Subject: Senate Bill 327

Madam Chairman and Members of the Committee:

My name is Jeff Chanay and I am an attorney in private practice with the Topeka firm of Entz & Chanay. I appear today as General Counsel for the Kansas Association of Homes and Services for the Aging, Inc. and in support of Senate Bill 327.

The Kansas Association of Homes and Services for the Aging represents over 150 not-for-profit retirement, nursing, and community service providers throughout Kansas. KAHSA is also the sponsoring Association for a group-funded workers compensation pool known as the Kansas Association of Homes for the Aging Insurance Group, Inc. (KING). As such, KAHSA has an interest in meaningful workers compensation reform. KAHSA supports most of the reforms contained in Senate Bill 327, but asks that the Committee consider three amendments to the bill that will significantly improve the legislation.

Senate Bill 327, on page 18, lines 23-25, amends K.S.A. 44-510e to change the permanent partial general disability (work disability) test for the third time in the last eight years. Certainly, a change in the current work disability test is warranted and necessary. However, the new test proposed in Senate Bill 327, in the view of KAHSA, does not constitute a significant improvement in this area of the law.

Senate Bill 327 provides for a return to a partial Ploutz test as utilized in Kansas prior to July 1, 1987. See Ploutz v. Ell-Kan Co., 234 Kan. 953 (1984). Senate Bill 327 mandates a two-prong work disability test, but changes the "loss of work tasks" prong to loss of ability to perform work tasks "of the same type and character that the employee was performing at the time of injury." Thus, under Senate Bill 327, the work tasks prong of the test measures loss of ability to perform the same job that the employee was performing at the time of injury and not loss of ability to perform work generally in the open labor market.

March 10, 1995
Commerce

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Attachment 4

The suggested amendment in Senate Bill 327 in regard to the first prong of the work disability test is extremely harmful to employers who employ workers in an occupation involving physical tasks in the medium to heavy work category. Certainly, employers who employ workers in manual labor jobs should be allowed to measure an employee's loss of ability to perform work in the open labor market.

Accordingly, KAHSA suggests that Senate Bill 327 be amended at page 18, lines 19-28 to read as follows:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee has lost the ability to perform work in the open labor market, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker has the ability to earn after the injury.

The work disability test suggested by KAHSA changes the first prong of the test as proposed in Senate Bill 327, but adopts the changes proposed in the second (wage loss) prong of the test.

Certainly, KAHSA recognizes that the 1993 amendments to the Workers Compensation Act were designed to eliminate the "battle of the experts." However, the pre-July 1, 1993 work disability test resulted in workers compensation awards that were significantly lower than those awards issued under the 1993 Act. It is submitted that the old Act was infinitely more fair to employers in this regard than the 1993 Act, which rewards employees who refuse to seek work.

Additionally, KAHSA suggests that Senate Bill 327 be amended at page 21, lines 26-29, by striking all of subsection (B) from the definition of "part-time hourly employee" as found in K.S.A. 44-511(a)(4) and making the necessary corresponding changes. KAHSA submits that subsection (B) of K.S.A. 44-511(a)(4) creates a windfall for part-time employees -- many of whom receive temporary total disability benefits at a rate higher than their actual average wage -- by setting the employee's average weekly wage based upon industry-wide average work hours and not on the employee's actual work hours pursuant to the employee's work agreement.

Finally, KAHSA suggests that Senate Bill 327 clarify K.S.A. 44-515 at page 25 to provide that an employer does not lose the right to direct medical treatment of an injured employee simply because an employer initially maintains a good-faith defense

that the employee's injury is not compensable under the Act. This change is necessary to overrule recent Board decisions to the contrary.

I thank the Committee for its consideration of these matters, and request that Senate Bill 327, as amended, be recommended favorably for passage.

Testimony on SB 327
Before the Senate Commerce Committee
By: Larry W. Magill, Jr., Executive Vice President
Kansas Association of Insurance Agents
March 10, 1995

Thank you, Madam Chair, and members of the committee, for the opportunity to appear today in support of SB 327 as well as some other changes we believe deserve legislative attention.

Early in the morning on April 30, 1993, nobody thought what they ended up with was a perfect bill in SB 307. But everyone agreed it was a good start.

Consider that workers compensation rates increased nearly 50% on average over the two years leading up to 1993 and have since only stabilized and decreased a total of 6.9% on average. Some employers have seen their rates go up much more, such as the oil and gas industry.

Oregon, which has probably the most enviable record in the country of workers compensation rate reductions, did not accomplish that with one reform effort.

Aggressive plaintiff's attorneys and the courts are likely to undo much of what has been accomplished or that we think we accomplished. It makes good sense to continue to improve on what we started in 1993 before Kansas reaches the "meltdown" stage again.

We think it is unrealistic to expect the workers compensation advisory council to agree on the clarifications and other changes suggested in SB 327. Time and judicial interpretations will be on the side of those who fought workers compensation reform in 1993. And to determine to do nothing without the advisory council's consent seems to

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Attachment 5

be an extraordinary delegation of legislative authority. To obtain their input, if they ever have a quorum to vote, is fine - to give them veto power is not.

And while the workers compensation market has begun to respond to the 1993 reform, we still have a long way to go. The Kansas Workers Compensation Insurance Plan (assigned risk) still accounts for 40% of the premium volume in Kansas as of December 31, 1993. While I know of one carrier that has entered the state to write unsupported workers compensation insurance, I know of another carrier that dropped out of writing workers compensation coverage because of the safety services required under SB 307. Three and possibly four heterogeneous workers compensation pools have been formed and a number of homogeneous pools. More insurance companies are willing to look at least at segments of the workers compensation market now than before reform. The market has clearly opened up, but needs to open up more.

We feel that SB 327 does a good job of clarifying legislative intent in 1993 on a number of those reforms while also clarifying other aspects of our workers compensation act and legislative intent not addressed in the 1993 reform. We feel that incremental improvement in the Kansas Workers Compensation Act needs to be undertaken on a regular basis and support the concepts in SB 327.

In addition, we urge the committee to consider the following changes not currently in SB 327:

1. Rather than a return to the "Ploutz" decision as proposed in SB 327, it may make more sense on the definition of work disability to shorten the time frame for consideration of lost job skills to five

years and instruct judges to impute a wage based upon evidence introduced into the record on a person's capability to earn wages. Depending on the number of jobs a person has had, it can be nearly impossible for the respondent to obtain information from previous employers on the skills used in a job held 15 years ago. Allowing evidence of a person's capability to earn wages reduces the likelihood someone could simply refuse to work and qualify for 100% work disability on that portion of the formula.

2. Take the concept embodied in SB 243 eliminating administrative law judges and creating workers compensation judges, but expand it to include the provisions in SB 59. Attached to our testimony is a bill draft that we think would accomplish a major improvement in the selection and retention of administrative law judges. Both labor and business appear to agree that the Workers Compensation Appeal Board nominating process has worked extremely well. We are suggesting that the same process be applied to workers compensation judges with an added requirement for a performance appraisal by the director of the Division of Workers Compensation before a workers compensation judge could be reappointed. As with the workers compensation appeal board, this should remove much of the politics from the selection process and guarantee "middle of the road" judges who would have an incentive to follow the decisions handed down by the workers compensation appeal board. We acknowledge that there is a constitutional question with this approach, but feel that it can be overcome.

3. Add the overpayment credit provision from SB 242 that provides that a claimant's future benefits would be reduced by the amount of

overpayment of previous benefits.

4. In addition to the change in unauthorized medical suggested in SB 327, we recommend that the committee consider tying the improper use of unauthorized medical into the fraud statute as a 21st category.

5. The Second Injury Fund has been "dead" since July 1, 1994. We suggest you "bury it" by eliminating any doubt as to whether a portion of the Second Injury Fund continues in effect. While we understand that the Department of Insurance has been interpreting the fund as being "dead" for new accidents occurring after July 1, 1994, there is the possibility that three or four years down the road a Supreme Court decision will say that a part of the fund has been alive all along. That would create a tremendous unfunded liability for employers in Kansas and prolong efforts to save the $4 million in administrative costs and attorneys fees currently being spent by the Second Injury Fund. We feel that is too large a risk to take.

We also urge the committee to consider placing a cap on future annual assessments by the fund on insurance companies, pools and self-insureds that ultimately are paid by employers at some reasonable level such as 5%. This would allow a predictable cost to be plugged into budgets, although it would stretch out the reimbursement of second injury claims. When the fund ran out of money in a given year, the legislature could either allow borrowing against the state general fund or provide "IOU's" to parties owed reimbursement by the fund until it could be paid. Keep in mind that there will be a number of new "players," pools, insurance companies and businesses that will be paying for the second injury fund with no chance of ever recovering anything.

6. Allow non-compensated officers and directors of nonprofits to elect into coverage under the Workers Compensation Act. Currently they cannot elect out since they do not own 10% or more of the corporation's stock. A nonprofit by definition does not issue stock. Without a specific statutory change, every nonprofit is subject to a substantial additional premium from their insurance company on audit if the auditor catches the fact that officers and directors are not being included. We do not believe the legislature ever intended to require coverage for volunteer nonprofit officers and directors. Nor do we believe most nonprofit officers, directors and trustees expect coverage. By making it an "election in" you greatly simplify the paperwork. Attached to my testimony is proposed amendment language.

We realize that the combination of SB 327 and these six additional proposed changes cover a wide range of workers compensation issues. However, many of them were dealt with in one form or another by SB 307 in 1993 and these are intended as clarification of that act. Others are administrative in nature and do not in any way cut benefits. Our workers compensation act is constantly changing. If the legislature takes no action, the act will still change through judicial interpretation. We urge the committee to continue the momentum begun in 1993 and pass SB 327 favorably with our proposed amendments.

AN ACT concerning workers compensation; reorganizing the division thereof; amending K.S.A. 1994 Supp. 75-5708 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1994 Supp. 75-5708 is hereby amended to read as follows: 75-5708. (a) There is hereby established within and as a part of the department of human resources a division of workers compensation. The division shall be administered, under the supervision of the secretary of human resources, by the director of workers compensation, who shall be the chief administrative officer of the division. The director of workers compensation shall be appointed by the secretary of human resources and shall serve at the pleasure of the secretary. The director shall be in the unclassified service under the Kansas civil service act and shall receive an annual salary fixed by the secretary of human resources, with the approval of the governor. The director of workers compensation shall be an attorney admitted to practice law in the state of Kansas. The director shall devote full time to the duties of such office and shall not engage in the private practice of law during the director's term of office.

(b) The director of workers compensation may appoint two assistant directors of workers compensation ~~and also may appoint not to exceed 10 administrative law judges~~. Such assistant directors ~~and administrative law judges~~ shall be in the classified service. The assistant directors shall act for and exercise the powers of the director of workers compensation to the extent authority to do so is delegated by the director. The assistant directors ~~and administrative law judges~~ shall be attorneys admitted to practice law in the state of Kansas, and shall have such powers, duties and functions as are assigned to them by the director or are prescribed by law. The assistant directors ~~and administrative law judges~~ shall devote full time to the duties of their offices and shall not engage in the private practice of law during their terms of office.

(c) There is hereby established the position of workers compensation judge. Such judges shall serve a four-year term, but shall be eligible for reappointment. Workers compensation judges shall hear and resolve disputes arising out of workers compensation claims and exercise such other duties as the director of workers compensation shall assign. Workers compensation judges shall be attorneys admitted to practice law in the state of Kansas. Workers compensation judges shall devote full time to the duties of their offices and shall not engage in the private practice of law during their terms of office. Workers compensation judges shall receive an annual salary equal to 90% of the annual salary of a district court judge.

(d) Applications for appointment as a workers compensation judge shall be submitted to the director of workers compensation. The director shall determine if an applicant meets the qualifications to be a workers compensation judge prescribed in subsection (c). Qualified applicants for the board will be submitted by the director to the workers compensation judge nominating committee for consideration.

(e) There is hereby established the workers compensation judge nominating committee which shall be composed of two members as follows: the Kansas AFL/CIO and the Kansas Chamber of Commerce and Industry shall each select one member to serve on the workers compensation judge nominating committee and shall give written notice of the nomination to the secretary who shall appoint such representatives to the committee. In the event of a vacancy occurring for any reason on the nominating committee, the respective member shall be replaced by the appointing organization with written notice of the appointment to the secretary of human resources within 30 days of such vacancy.

(f) (1) Upon being notified of any vacancy in a workers compensation judge position or of the need to appoint a judge pro tem under subsection (h), the nominating committee shall consider all qualified applicants submitted by the director for the vacant position or the judge pro tem position and nominate a person qualified therefor. The nominating committee shall be required to reach unanimous agreement on any nomination for workers compensation judge or judge pro tem. With respect to each person nominated, the secretary either shall accept and appoint the person nominated by the nominating committee to the position for which the nomination was made or shall reject the nomination and request the nominating committee to nominate another person for that position. Upon receipt of any such request for the nomination of another person, the nominating committee shall nominate another person for that position in the same manner.

(2) The initial terms of office of workers compensation judges shall be staggered. Two judges shall be appointed for a one year term. Two judges shall be appointed for a two year term. Three judges shall be appointed for a three year term. And three judges shall be appointed for a four year term.

(3) Each judge shall hold office for the term of the appointment and until the successor shall have been appointed. Successors to such judges shall be appointed for terms of four years.

(4) If a vacancy should occur in a workers compensation judge position during the term of a judge, the nominating committee shall nominate an individual from the qualified applicants submitted by the director to complete the remainder of the unexpired portion of the term. With respect to each person so nominated, the secretary shall either accept and appoint the person nominated or shall reject the nomination and request the nominating committee to nominate another person for the position.

Upon receipt of any such request for the nomination of another person, the nominating committee shall nominate another person for the position in the same manner.

(g) (1) Following the completion of a term, judges who wish to be considered for reappointment to the position of workers compensation judge shall be deemed to have met the qualification requirements for selection and shall be considered for renomination by the workers compensation judge nominating committee.

(2) The director shall conduct a performance appraisal of each workers compensation judge 90 days prior to the end of each workers compensation judge's term and submit a report to the workers compensation judge nominating committee. The performance appraisal shall include, but not be limited to, a measurement of how current the judge remained on the judge's docket compared to the norm, how many of the judge's decisions were appealed compared to the norm, how many of the judge's decisions were overturned by the appeal board and such other information as the director shall deem relevant.

(h) If illness or other temporary disability of a judge will not permit the judge to serve during a case or in any case in which a judge must be excused from serving because of a conflict or is otherwise disqualified with regard to such case, the director shall notify the workers compensation judge nominating committee of the need to appoint a judge pro tem. Upon receipt of such notice, the committee shall act as soon as possible and nominate a qualified person to serve as judge pro tem in such case in accordance with subsection (f). Each judge pro tem shall receive compensation at the same rate as a judge receives, prorated for the days of actual service as a judge pro tem and shall receive expenses under the same circumstances and to the same extent as a judge receives. Each judge pro tem shall have all the powers, duties and functions of a workers compensation judge with regard to the case.

(i) ~~(e)~~ Assistant directors ~~and administrative law judges~~ shall be selected by the director of workers compensation , with the approval of the secretary of human resources. Each appointee shall be subject to either dismissal or suspension of up to 30 days for any of the following:

(1) Failure to conduct oneself in a manner appropriate to the appointee's professional capacity;

(2) failure to perform duties as required by the workers compensation act; or

(3) any reason set out for dismissal or suspension in the Kansas civil service act or rules and regulations adopted thereto.

No appointee shall be appointed, dismissed or suspended for political, religious or racial reasons or by reason of the appointee's sex.

(j) *The position of administrative law judge is hereby abolished.*

Sec. 2. K.S.A. 1994 Supp. 75-5708 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

44-551 allows appointment of emergency ALJ's

5.9

Section 1. (a) as used in this section:

(1) "Nonprofit organization" means those nonprofit organizations exempt from federal income tax pursuant to section 501(c) of the internal revenue code of 1986, as in effect on the effective date of this act.

(2) "Compensation" does not include actual and necessary expenses that are incurred by a volunteer officer, director or trustee in connection with the services that the volunteer performs for a nonprofit organization and that are reimbursed to the volunteer or otherwise paid.

(3) "Volunteer Officer, director or trustee" means an officer, director or trustee who performs services for a nonprofit organization but does not receive compensation, either directly or indirectly, for those services.

44-543. Election by certain employees.

(a) Any employee of a corporate employer who owns ten percent (10%) or more of the outstanding stock of such employer, may file with the director, prior to injury, a written declaration that he elects not to accept the provisions of the workmen's compensation act, and at the same time, he shall file a duplicate of such election with the employer. Such election shall be valid only during his term of employment with such employer. Any employee so electing and thereafter desiring to change his election may do so by filing a written declaration to that effect with the director and a duplicate of such election with the employer. Any contract in which an employer requires of an employee as a condition of employment that he elect not to come within the provisions of the workmen's compensation act, shall be void. Any written declarations filed pursuant to this section shall be in such form as may be required by regulation of the director.

History: L. 1927, ch. 232, § 51; L. 1959, ch. 221, § 1; L. 1961, ch. 243, § 11; L. 1974, ch. 203, § 38; July 1.

(b) Any noncompensated volunteer officier, director or trustee of a non-profit corporation as defined in section (1) may elect to bring himself or herself within the provisions of the workers compensation act by filing with the director, prior to injury, a written declaration that the officer, director or trustee elects to accept the provisions of the workers compensation act, and at the same time, the person shall file a duplicate of such election with the employer and the employer's insurance company or qualified group-funded workers compensation pool.